Nos. 87-5666 and 87-6026

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

Petitioner

v.

WALTER ZANT,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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HEATH A. WILKINS,

Petitioner

v.

STATE OF MISSOURI,

Respondent

On Writ of Certiorari to the Missouri Supreme Court

BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION

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BRIEF OF AMICUS CURIAE THE AMERICAN BAR ASSOCIATION

INTEREST OF THE AMICUS CURIAE

The American Bar Association [hereinafter "ABA"] is a voluntary, national membership organization of the legal profession. Its over 343,000 members come from every state and territory and the District of Columbia. The constituency of the ABA includes prosecutors, public defenders, private attorneys, trial and appellate judges

at the state and federal levels, legislators, law enforcement and corrections professionals, law school deans, law professors, law students, and a number of non-lawyer associates in allied fields.

Since its inception over one hundred years ago, the ABA has taken an active interest in improving the administration of justice. It has also taken a special interest in the improvement of the juvenile justice system. Toward these ends the ABA has promulgated two comprehensive sets of standards, the ABA *Standards for Criminal Justice* and, in conjunction with the Institute of Judicial Administration (IJA), the IJA/ABA *Juvenile Justice Standards.*

The IJA/ABA Juvenile Justice Standards Drafting Project, which was completed in 1980 with the adoption of the *Juvenile Justice Standards*, involved one of the most thorough studies of our society's response to the problems of juvenile crime ever undertaken. The Standards not only provide a thorough analysis of the historical, legal, and criminological developments in society's effort to respond to juvenile crime, but, because of the diversity of disciplines and perspectives represented by the contributors, the Standards in many ways reflect our society's knowledge, attitudes and values about children who commit crimes. The Project took no position on the death penalty.

In 1983, however, the ABA House of Delegates adopted a resolution opposing, on policy grounds, capital punishment for crimes committed by minors under the age of eighteen years [hereinafter referred to as the "juvenile death penalty"]: "BE IT RESOLVED, that the American Bar Association opposes, in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, *Summary of Actions of the House of Delegates, 1983 Annual Meeting, Reports of Sections* 17. The House of Dele-

gates took no position on the constitutionality of the juvenile death penalty. The adoption of the House resolution followed almost two years of research and consideration of the issue by the ABA Section on Criminal Justice, as summarized in its Report to the House of Delegates in support of the resolution. ABA, Criminal Justice Section, *Report with Recommendations to the House of Delegates*, Report No. 117A (August 1983) (hereinafter cited "ABA Juvenile Death Penalty Report").

The imposition of the death penalty for crimes committed by minors presents its own special concerns of justice. This claim is underscored by the fact that the ABA has rejected resolutions to limit the use of the death penalty for adults. In 1977, the ABA Section on Individual Rights and Responsibilities proposed a resolution urging the state legislatures to abolish the death penalty in all cases. That resolution failed by a 168-69 vote. ABA *Summary of Actions of the House of Delegates, 1977 Mid-year Meeting, Reports of Sections* 18. In 1979, the ABA Criminal Justice Section proposed a resolution to approve sentencing guidelines limiting the circumstances under which capital punishment could be imposed. That resolution failed in the House of Delegates by voice vote. ABA *Summary of Actions of the House of Delegates, 1979 Annual Meeting, Reports of Sections* 23. This year the House of Delegates passed a resolution supporting the enactment of federal and state legislation which strives to eliminate any racial discrimination in capital sentencing, while again emphasizing that "this resolution does not create a position for the ABA on whether or not capital punishment is an appropriate criminal sanction." *ABA Summary of Actions of the House of Delegates, 1988 Annual Meeting, Reports of Sections* —.

The ABA participated as amicus curiae in *Thompson* v. *Oklahoma*, 108 S.Ct. 2687 (1988), and set forth in its

brief the considerations which led to the ABA position that the juvenile death penalty cannot be reconciled with contemporary societal values. Although a number of these considerations were acknowledged in the plurality and concurring opinions in *Thompson*, the Court did not reach the issue of the constitutionality of imposing capital punishment for crimes committed by minors under the age of eighteen. The ABA participates as amicus curiae in these cases to underscore the Association's position that for reasons central to our perceptions of ourselves as a civilized society the death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

SUMMARY OF ARGUMENT

Our society recognizes that minors are less mature, less experienced, less able to exercise good judgment and self-restraint, more susceptible to environmental influence (both positive and negative), and as a result, less responsible and less culpable in a moral sense than adults. *See* IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3 (1980). In light of these characteristics, minors are neither entitled to all the rights and privileges of adulthood, nor are they given the full obligations of adulthood until they reach their eighteenth birthdays. *See, e.g.*, U.S. Const. amend. XXVI, § 1.

Because our criminal justice system is based on concepts of individual responsibility, the differences between minors and adults in their capacities to assume such responsibility, recognized in other legal contexts, should be reflected in our response to crimes committed by minors. The development of the juvenile justice system is the clearest manifestation of society's commitment to this principle of separate treatment of adult and juvenile offenders. Notwithstanding the distinctions in law and fact between minors and adults, the juvenile justice system cannot deal with all juvenile crime. Some minors who commit serious crimes must be subject to trial and sentencing in the criminal justice system in order adequately to protect society and vindicate the criminal laws. However, the fact that a minor is appropriately tried in the criminal justice system does not mean that the ultimate criminal sanction, execution, is appropriate.

The special nature of childhood in our society led to the ABA position against the juvenile death penalty and is directly relevant to the issue before the Court. The death penalty is reserved for people whose crimes are so severe, whose character is so depraved, and whose moral culpability is so great as to warrant the ultimate sanction. *See generally Zant v. Stephens*, 462 U.S. 862 (1983); *Gregg v. Georgia*, 428 U.S. 153 (1976). For the same reason we in other legal contexts conclusively presume that minors under the age of eighteen are not mature and responsible to the same extent as adults, they should not be held to the degree of moral accountability necessary to justify the ultimate sanction of execution.

ARGUMENT

BECAUSE THE LAW CONCLUSIVELY AND PRUDENTLY PRESUMES THAT MINORS UNDER THE AGE OF EIGHTEEN ARE NOT CAPABLE OF EXERCISING THE FULL RESPONSIBILITIES OF ADULTHOOD, THEY SHOULD NOT BE HELD TO THE LEVEL OF MORAL ACCOUNTABILITY NECESSARY TO JUSTIFY THE IMPOSITION OF THE PUNISHMENT OF DEATH.

Although the ABA has taken no position on the constitutionality of the juvenile death penalty, the reasons for opposing that sanction as a matter of policy are relevant to this Court's consideration of the constitutional issue. The ABA policy both derives from and reflects the special significance that our society attaches to the status of minority—a special significance that shapes and defines the issue in this case.

As this Court has observed in a number of different contexts, "children have a very special place in life which the law should reflect." *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). In cases which present fundamental questions involving minors—in this case questions of life and death—we cannot ignore the significance of the status of minority. "Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children." *Id.*

Minors are "most susceptible to influence and psychological damage" and "lack the experience, perspective and judgment to recognize and avoid choices that could be detrimental." *Bellotti v. Baird*, 443 U.S. 602, 635 (1979). They are in the early stages of their emotional growth; their intellectual development is incomplete; they have only limited practical experience; and their value systems are not yet clearly identified and firmly adopted. *Schall v. Martin*, 467 U.S. 253, 265 n.15 (1984) (citing *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682, 350 N.E.2d 906 (1976)). Unlike adults, minors are always in some form of custody and subject to the control of their parents or the state as *parens patriae* upon whom the responsibility of making important decisions for the minor traditionally rests. *Schall v. Martin*, 467 U.S. at 265; *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

It is only upon the premise that a minor "is not possessed of that full capacity for individual choice . . . that a state may deprive children of . . . rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults." *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring). The law thus "recognizes a host of distinctions between the rights and duties of children and those of adults." *New Jersey v. T.L.O.*, 469 U.S. 325, 350 n.2 (1985) (Powell, J., concurring.)

This recognition is apparent in the development of a separate juvenile justice system for dealing with juvenile crime. Separate treatment of juveniles for their criminal conduct is a relatively recent development. Under common law, children over the age of seven (the age below which a child was considered incapable of possessing criminal intent) were subjected to criminal prosecution and punishment like adult offenders. *In re Gault*, 387 U.S. 1, 16 (1967). However, reaction to the harshness of a system that made no distinction between minor and adult when criminal conduct was involved was widespread and led to the development of separate juvenile justice systems in every jurisdiction in the country. *Id.* at 14-15. The underlying premise of this separate system was that minors are less mature, less able to exercise control and judgment, more easily influenced by others and by their environment and thus less culpable than adults for their actions.

Despite the more recent recognition that the achievements of separating systems of juvenile and criminal justice have fallen short of the goals, *see id.* 387 U.S. at 17-18, our society has not abandoned the underlying premise that minors who commit crimes should be treated differently from adults. *See, e.g., McKeiver v. Pennsylvania*, 403 U.S. 258 (1973); *Schall v. Martin*, 467 U.S. 253 (1984). Thus, the IJA/ABA *Juvenile Justice Standards*, which provide a candid critique of the juvenile justice system and call for considerable system reform, nevertheless reaffirm the vitality of this underlying principle.[1] *See* IJA/ABA *Standards for Juvenile Justice: Summary and Analysis* 40-41 (1982).

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[1] There is a tendency to distinguish the juvenile justice system from the criminal justice system by contrasting the "rehabilitative" goals of the former with the "punitive" goals of the latter. However, as this Court has noted, the juvenile justice system has punitive characteristics, *see In re Gault*, 387 U.S. at 27-30; and the criminal justice system is not unconcerned with treatment and

While not addressing the death penalty issue directly, the IJA/ABA *Juvenile Justice Standards* deal specifically with the issue of subjecting some minors who commit crimes to the jurisdiction of the criminal court. Notwithstanding our recognition that minors should not be held to the same standards of criminal responsibility as adults, the protection offered by the juvenile justice system is not appropriate for some minors. IJA/ABA *Juvenile Justice Standards Relating to Transfer Between Courts* 3. Some acts are so offensive to the community that only criminal court jurisdiction can ensure that control is maintained over the juvenile offender for a period proportionate to his offense and prior record. *Id.* However, the existence of a mechanism for transfer of jurisdiction and the acceptance of the necessity of being able to exercise criminal court jurisdiction over children for commission of serious crimes does not establish the propriety of treating a minor as an adult for the specific and extreme purpose of imposing the death penalty. The transfer decision—whether discretionary with the judge or prosecutor or mandated by the legislature—does not involve a determination that a minor is as mature as an adult and often involves no consideration of individual maturity, especially when the offense is most serious. *See* Note, *The Decency of Capital Punishment for Minors: Contemporary Standards and the Dignity of Juveniles*, 61 Ind. L. Rev. 757, 771-72 (1986); Comment, *Capital Punishment for Minors: An Eighth Amendment Analysis*, 74 J. Crim. L. and Criminology, 1471, 1476-79 (1983). Rather the transfer of jurisdiction is often a pragmatic

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rehabilitation. *See Breed v. Jones*, 421 U.S. 519, 530 n.12 (1975). In the ABA's view, whether the guiding principle articulated is treatment, rehabilitation, protection of society through deterrence, or retribution, it is the fact of childhood and the fundamental differences between minors and adults that are the critical factors which ultimately provide the rationale for separate systems. *See IJA/ABA Juvenile Justice Standards Relating to Dispositions, Standard 1.1* and commentary thereto (1980).

decision that the limited jurisdiction of the juvenile justice system cannot provide adequate protection for the community. *See Thompson v. Oklahoma*, 108 S.Ct. 2687, 2707 (1988) (O'Connor, J., concurring).

The factors that warrant transfer and the concomitant decision to subject the minor to the lengthy sentences available in criminal court thus do not resolve the issue of the propriety of the death penalty for the minor who is transferred. It is not at all incongruous to find states in which the juvenile death penalty had been statutorily permissible lowering the minimum age for transfer to adult court as part of "getting tough" on juvenile crime while at the same time eliminating the juvenile death penalty. *See, e.g.*, Tenn. Code Ann. § 37-1-134(1) (1984) (1982 amendments); Or. Rev. Stat. §§ 161.620 (1985), 419.533 (1983) (1985 amendments).

The issue before this Court is whether a minor under the age of eighteen can, consistent with the Eighth Amendment, be held to that level of responsibility and moral culpability for which society reserves the penalty of death. The words of the Eighth Amendment proscribing imposition of criminal penalties which are cruel and unusual, "are not precise and . . . their scope is not static." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). The meaning of the Amendment is drawn "from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Thus, punishments which may have been accepted by society when this amendment was adopted can come to be viewed in our time as excessive and unconstitutional. *Gregg v. Georgia*, 428 U.S. at 171 (opinion of Stewart, Powell and Stevens, JJ.).

The death penalty is different in kind from any other criminal punishment; it is "unique in its severity and irrevocability." *Id.* at 187. In light of this, this Court has held that the discretion to impose the death penalty

must be limited and directed to ensure that it is not inflicted in an arbitrary and capricious manner. *Zant v. Stephens*, 462 U.S. at 874. Not only must the sentencing authority be provided guidelines, but it must be able to consider any and all mitigating factors, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), including the character and record of the individual and the circumstances of the particular offense, *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell and Stevens, JJ.) and must in fact consider such mitigating factors. *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

In certain situations, however, the Court has refused to allow the sentencing authority the discretion to determine whether a defendant should live or die based on a balancing of aggravating and mitigating circumstances presented by the individual case. If the crime is the rape of an adult woman and it does not result in the death of the victim, the death penalty is prohibited. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). If the crime results in the death of the victim, but the person charged is guilty of felony murder *simpliciter*, the death penalty is prohibited. *Enmund v. Florida*, 458 U.S. 782, 788 (1982). For felony murders, the standard appears to be that the death penalty may be imposed if the defendant is a major participant in the felony committed who acted intentionally or with reckless indifference to human life. *Tison v. Arizona*, 107 S.Ct. 1676, 1688 (1987). Thus, there are situations in which ensuring an individualized consideration of the circumstances of the offense simply does not satisfy the Eighth Amendment; this Court has therefore prohibited execution in such cases.

This Court has already recognized that the youth of a defendant is a mitigating factor which is entitled to great weight, *Eddings v. Oklahoma*, 455 U.S. at 116. In *Thompson v. Oklahoma*, four members of this Court

held that the youth of the defendant alone, at least where the child is under the age of sixteen, is an absolute bar to execution, 108 S.Ct. at 2700, and one Justice, although concurring on narrower grounds, indicated her belief that the plurality was probably correct. 108 S.Ct. at 2706 (O'Connor, J., concurring). The issue in this case is whether, when the crime is committed by a minor under the age of eighteen, the fact of minority is of such overriding importance that a bright line must be drawn prohibiting execution.

In determining whether a particular punishment once tolerated can no longer be reconciled with our advancing standards of decency, the Court has looked to various indicia of contemporary values and attitudes. *Coker v. Georgia*, 433 U.S. at 592 n.10. As the plurality noted in *Thompson v. Oklahoma*, the position of the ABA itself is an indicator of such values and attitudes. *See Thompson v. Oklahoma*, 108 S.Ct. at 2696. The House of Delegates which sets ABA policy is composed of representatives of every state and reflects the broad spectrum of political and social views of the legal community. See Appendix A (ABA Constitution and Bylaws concerning composition of House of Delegates). The fact that the ABA, which has not opposed the death penalty for adults, is opposed to the death penalty for juveniles, is one reflection of the national consensus on this issue.

Moreover, the ABA Juvenile Death Penalty Report considered other indicia of contemporary values and attitudes such as international and legislative norms in concluding that a civilized society should no longer allow execution for crimes committed by minors. The ABA considered evidence, documented by the plurality opinion in *Thompson v. Oklahoma*, 108 S.Ct. at 2696, that the juvenile death penalty is overwhelmingly rejected in the international community. The ABA also found evidence of the unacceptability of the juvenile death penalty in the increasing number of states that upon specific con-

sideration of the application of the death penalty to persons below the age of eighteen have rejected it. *See Thompson v. Oklahoma*, 108 S.Ct. at 2696 n.30. This evidence was particularly compelling in light of the reenactment of the death penalty in thirty-five jurisdictions since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

Finally, the ABA Juvenile Death Penalty Report considered the role of a death penalty for juveniles in furthering deterrence and retribution, two values recognized by this Court as legitimate bases for imposing criminal penalties including capital punishment. *Gregg v. Georgia*, 428 U.S. at 183 (1976) (opinion of Stewart, Powell and Stevens, JJ). The report concluded that these justifications ". . . lose much of their persuasiveness when applied to an adolescent's case." ABA Juvenile Death Penalty Report 8-9. Whatever deterrent effect might exist for potential adult offenders, *Gregg v. Georgia*, 428 U.S. at 184-85, in light of the characteristics associated with childhood—impulsiveness, lack of self control, poor judgment, feelings of invincibility—the deterrent value of the juvenile death penalty is likely of little consequence. In any event, it would be difficult to support a claim that the death penalty as a deterrent for juvenile crime, as opposed to life imprisonment, "is an indispensable part of the State's criminal justice system." *Coker v. Georgia*, 437 U.S. at 592 n.4. Whatever deterrent value might exist is insignificant when balanced against the societal values compromised by the juvenile death penalty.

Retribution, defined by this Court as "the expression of society's moral outrage at particularly offensive conduct" *Gregg v. Georgia*, 428 U.S. at 183, is also an unsatisfactory justification for the juvenile death penalty. The moral force of—and thus the legal justification for—taking human life in retribution is dependent on the degree of culpability of the offender, and not just on the injury to the victim. *See Enmund v. Florida*, 458 U.S. at

800. Because of our societal attitudes and well-founded legal presumptions regarding the status of minority, a minor simply cannot be held to that degree of culpability and accountability.

Lines drawn on the basis of age inevitably appear arbitrary for those near the line of demarcation. However, as a society we must in important matters of legal rights and responsibilities make distinctions based on age alone that are absolute and allow no exceptions for the particularly responsible or irresponsible person of that age. In areas in which the rights exercised or the responsibilities imposed are of the highest order in our society—the right to vote and the responsibility to serve on a jury—every jurisdiction conclusively presumes that children under the age of eighteen, no matter how mature, are incapable of exercising adult responsibility. *See Thompson v. Oklahoma*, 108 S.Ct. at 2701, Appendices A and B. Even the dissent recognizes that at some point age alone must be held to be an absolute bar to execution. *Thompson v. Oklahoma*, 108 S.Ct. at 2714. The ABA submits that the appropriate point to draw the line for purposes of the death penalty is at the age of eighteen.

CONCLUSION

The death penalty should not be imposed upon any person for any offense committed while under the age of eighteen.

Respectfully submitted,

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APPENDIX A

American Bar Association, Constitution and Bylaws; Rules of Procedure House of Delegates; Article 6, Section 6.1 and 6.2 (1987-88).

Article 6. The House of Delegates

§ 6.1 Powers and Functions. The House of Delegates shall control, formulate policy for, and administer the Association. It has all the powers necessary or incidental to performing those functions. It shall supervise and direct the Board of Governors, officers, sections, committees, and employees and agents of the Association. It may adopt rules consistent with the Constitution and Bylaws. It is the judge of the election and qualifications of its members.

§ 6.2 Composition. (a) The House of Delegates, which is designed to be representative of the legal profession of the United States, is composed of the following members of the Association:

The State Delegates, one for each state, who also serve as chairmen of the delegate groups from the respective states.

The state bar association delegates, at least one for each state.

The delegates from eligible local bar associations, one for each eligible association.

The Assembly Delegates elected by the Assembly, 15 in number.

The delegates representing the respective sections of the Association, at least one for each section and the Senior Lawyers Division except four for the Young Lawyers Division (including the Young Lawyers Division representative on the Nominating Committee), and two for the Law Student Division.

The delegates representing the following conferences of the Judicial Administration Division: One each for

the Appellate Judges' Conference, the National Conference of State Trial Judges, the National Conference of Special Court Judges, the National Conference of Federal Trial Judges, and the Conference of Administrative Law Judges.

The members of the Board of Governors, except the administrative officer.

The former elected members of the Board of Governors, for two Association years immediately following the end of their respective terms.

The former presidents of the Association and former chairmen of the House of Delegates; provided that all former presidents or chairmen elected to those positions after August 15, 1975, shall be full voting members of the House for ten years after the conclusion of their service as president or chairman and with voice but no vote thereafter.

The former secretaries and former treasurers of the Association who have had three or more years of service as such, as except that a former officer first elected to an office that qualifies him under this provision after August 15, 1975, may serve for only the five Association years immediately following the end of this term.

The Attorney General of the United States or, at his option, the Deputy Attorney General or the Solicitor General.

The Director of the Administrative Office of the United States Courts.

The delegates from affiliated organizations, one for each organization.

(b) Beginning in 1995 and at least once every ten years thereafter, a review of the representation in the House in terms of Association membership shall be conducted to ensure appropriate representation of the above constituencies.